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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 64

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
As Amicus Curiae,
By ELISHA HANSON, *Counsel for Amicus Curiae.*

INDEX.

	Page
Statement of the case	1
Interest of the Amicus Curiae	2
Argument	3
Point I—The exercise of the judicial power to punish for constructive contempt by publication must conform to the Federal constitutional guarantee against abridgment of the freedom of the press	3
Point II—The editorials in question in this case are not punishable as contemptuous publications when measured by any of the tests applied by this Court. Therefore, the convictions for contempt are in violation of the constitutional guarantee of a free press as set forth under Point I	5
Conclusion	10

Cases Cited.

De Jonge v. *Oregon*, 299 U. S. 353 (1937)	4, 5
Grosjean v. *American Press Co.*, 297 U. S. 233 (1937)	3, 9
Herndon v. *Lowry*, 301 U. S. 242 (1937)	6, 7
Lovell v. *City of Griffin*, 303 U. S. 444 (1938)	4
Near v. *Minnesota*, 283 U. S. 697 (1931)	3, 7
Nixon v. *State*, 207 Ind. 426, 193 N. E. 591 (1935)	7
Patterson v. *Colorado*, 205 U. S. 454 (1907)	7
Schneider v. *The State (Town of Irvington)*, 60 Sup. Ct. 146 (1939)	4, 7
State v. *American News Co.*, 64 So. Dak. 385, 266 N. W. 827 (1936)	7
Toledo Newspaper Co. v. *United States*, 247 U. S. 402 (1918)	7, 8

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This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in support of the petition for a writ of certiorari filed by The Times-Mirror Company, a corporation, and L. D. Hotchkiss, in the above entitled case.

Statement of the Case.

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the petition for a writ of certiorari herein.

Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Association is vitally interested in a clarification by this Court of the fundamental issue presented in this case, namely, the limits of editorial comment by newspapers upon matters of great public importance pending in or decided by the courts.

The function of the daily newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

The Amicus Curiae submits that the judgments of conviction for contempt here sought to be reviewed constitute an abridgment of the foregoing functions of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT.

Point I.

The exercise of the judicial power to punish for constructive contempt by publication must conform to the Federal constitutional guarantee against abridgment of the freedom of the press.

The history of the struggle for a free press reveals that the framers of the Bill of Rights wrote the First Amendment to the Federal Constitution to prohibit every conceivable form of abridgment of freedom of the press. *Any restraint from any source and by any method* was considered repugnant to the constitutional guarantee. Accordingly, the grant of immunity exempts the press from previous executive and legislative restraint and protects the press against punishment subsequent to a publication which does not constitute a clear abuse of the liberty of the press. *Near* v. *Minnesota*, 283 U. S. 697 (1931).

The historical background of the First Amendment compels the conclusion that the foregoing constitutional limitations operate upon the judicial as well as the executive and legislative branches of the government.

This is especially a matter of grave concern as applied to the summary judicial power to punish for constructive contempt by publication. Unless that power is exercised with utmost delicacy and caution it may easily operate as a previous restraint upon publication and as a subsequent punishment for publications which are not detrimental to the public welfare.

In recent years this Court has affirmed and reaffirmed its determination "to preserve an untrammeled press as a vital source of public information". *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1937), where this Court said at page 250:

> "The newspapers, magazines and other journals of this country, it is safe to say, have shed and continue

> to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

See also *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *The State* (*Town of Irvington*), 60 Sup. Ct. 146 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937).

In performing the essential functions of the press, publishers are merely trustees of the right of the people to have information on matters of public importance free from the censorship of those in authority.

The Amicus Curiae fully recognizes the equal importance of preserving the independence of the judiciary and its freedom from interference in fearless and impartial administration of justice. It is not necessary to subordinate either right to the other. But the condemnation by this Court of executive and legislative restraints invoked against the press makes it plain that it will not countenance judicial restraints upon fair and honest comment on public questions involved in judicial proceedings. This Court has said that the constitutional guarantee of a free press is not to be taken lightly. In balancing the right to a free press against the independence of the judiciary the decisions of this Court unmistakably demonstrate that judicial power to punish for contempt by publication will be confined to clear cases of abuse.

If this judicial power is not thus confined, the guarantee of a free press will be seriously undermined. Publishers will become subservient to the will of judges who are sensitive to criticism or aloof from the democratic check of public opinion. In proceedings for contempt by publication the ultimate responsibility for a proper balance between

an unfettered press and an independent judiciary rests upon the courts themselves and their own sense of self-restraint. Since a free press, together with free speech and free assembly, constitutes "the security of the Republic, the very foundation of constitutional government" (*De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937)), it is wiser to cast the balance in its favor than in the direction of restriction.

Point II.

The editorials in question in this case are not punishable as contemptuous publications when measured by any of the tests applied by this Court. Therefore, the convictions for contempt are in violation of the constitutional guarantee of a free press as set forth under Point I.

In the interest of conciseness the Amicus Curiae adopts the summary of the contents of the editorials in question as set forth in the petition for certiorari and brief in support thereof.

Out of a great volume of editorial comment and criticism printed in the columns of the newspapers of this country, only an insignificant percentage of these publications have been questioned by the courts in contempt proceedings. In such instances the courts have almost universally confined punishment for contempt to cases where the publication is clearly and unmistakably beyond the limits of legitimate comment and criticism.

It is of paramount importance to the press of this country that the same definite and certain standards which this Court has recently applied in setting aside executive and legislative infringements of free press and free speech should be made equally applicable to judicial action in contempts by publication.

In its vigilance over fundamental personal rights and liberties this Court has never failed to bring doubtful prec-

edents of an earlier date into harmony with the mandates of the Constitution.

In *Herndon* v. *Lowry*, 301 U. S. 242 (1937), this Court finally clarified the criteria and adopted the test of "clear and present danger" in cases involving freedom of speech. It specifically rejected standards so "vague and indefinite" as to spread a "dragnet which may enmesh anyone".

The application by the Supreme Court of California to the editorials in the present case of the test of "reasonable tendency" to interfere with the orderly administration of justice requires a determination by this Court of the relevancy of the test of *Herndon* v. *Lowry*, *supra*, to contempts by publication.

The Amicus Curiae perceives no ground upon which the judiciary in exercising its contempt power can insulate itself against the constitutional limitations imposed upon the other two branches of our government. Such an anomalous doctrine would make the judiciary paramount to the Constitution and to the government of which it is an integral part.

If the press is to remain truly free, the line of demarcation between privileged comment and abuse of liberty must be drawn by a definite and certain standard of guilt. Otherwise, publishers will be constantly exposed to the peril of having remote inferences and unfounded innuendoes read into editorial comments by judges who are prone to exercise censorship in the mistaken belief that the independence of the judiciary is at stake. The "clear and present danger" test affords protection against subtle encroachments of nebulous standards applied by oversensitive judges. The brooding omnipresence of fear engendered by the test of "reasonable tendency" might have such a deterrent effect upon free and timely editorial discussion of cur-

rent public questions as to reduce freedom of the press to "a mere intellectual abstraction" and an empty phrase.

Only brief reference will be made to the cases in which this Court has reviewed questions of contempt by publication. The Amicus Curiae is convinced that *Patterson* v. *Colorado*, 205 U. S. 454 (1907), and *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918), are not directly responsive to the issues presented in this case and are distinguishable on their facts. More important is the fact that the views there expressed require clarification in the light of the present doctrine of this Court as announced in *Herndon* v. *Lowry*, *supra*, and the conflicting statements of the State courts which have passed upon publications affecting the judiciary. Compare the instant case with *State* v. *American News Company*, 64 So. Dak. 385, 266 N. W. 827 (1936); *Nixon* v. *State*, 207 Ind. 426, 193 N. E. 591 (1935).

Patterson v. *Colorado*, *supra*, and *Toledo Newspaper Co.* v. *United States*, *supra*, antedate the basic decisions of this Court in the line of cases beginning with *Near* v. *Minnesota*, 283 U. S. 697 (1931) and ending with the most recent decision in *Schneider* v. *The State (Town of Irvington)*, 60 Sup. Ct. 146 (1939).

The substantial Federal question of constitutionality raised by the petition in this case calls for a review of the earlier opinions of this Court in constructive contempt cases in relation to the more recent doctrine enunciated by this tribunal in the free press and free speech cases mentioned above.

The Amicus Curiae respectfully submits that the editorials in this case are not punishable by *any* of the tests applied by this Court. Regardless of what test is applied, the editorials are clearly within the limits of permissible comment and criticism.

It is well established that whether or not publications are contemptuous will be determined by a fair interpretation of the language used. The words will be construed in their context and the general tone of the statements will be considered as well as all the pertinent circumstances surrounding their publication. When the proceeding is criminal and punitive in nature, every intendment consistent with the defendant's innocence should be indulged. Moreover, the meaning of the language is viewed from the standpoint of a strong judge, "a man of ordinary firmness of character". Mr. Justice Holmes, dissenting, in *Toledo Newspaper Co.* v. *United States, supra.*

The three editorials upon which the judgments of conviction are based are entirely free from any of the features which exceed the bounds of legitimate editorial analysis and opinion. None of them scandalizes the court, impeaches the integrity of any judge, imputes improper motives or utters threats. One could hardly imagine a case where the publications in question are so clearly and unmistakably free from elements which have been challenged by the courts as contemptuous.

The editorial "Sit-Strikers Convicted" merely records a forceful but not intemperate approval of a jury verdict which is in accord with the long established policy espoused by The Times-Mirror. It represents an irreducible minimum of the kind of comment without which a newspaper cannot perform its function as a molder of community opinion on disputed questions of social and economic policy.

The editorial "The Fall of an Ex-Queen" is typical of numerous comments in newspapers of the anti-social affects of political "bossism". It merely points to the moral that the over-ambition for political power of a certain woman was responsible for her downfall.

The editorial "Probation for Gorillas" voices the opinion that the good of the community requires a denial of a pending petition for probation, a matter on which informed opinion is often sought from any interested party. No attack is made upon the judge's character nor is he charged with prejudice or political bias and there is no threat of retaliation. The editorial is a proper exercise of the function of the press in presenting views on a vital public issue in the field of criminal law enforcement where complaints about ill-advised clemency are frequently expressed.

The record does not show that any of the judges before whom the related cases were tried, read, or even heard of the editorials at the time they were published. It was not shown that any of the judges complained that he was influenced or embarrassed by the editorials.

The conclusion that the editorials in question fall within the scope of permissible comment and criticism upon issues of far-reaching public importance is inescapable.

This Court has said:

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1937).

The Amicus Curiae is confident that this Court will not suffer the press to be fettered by the judiciary upon which rests the ultimate responsibility for reconciling its own independence with the commands of the Constitution. Suppression of free discussion of public questions is a grave peril to all democratic institutions, including the courts themselves. Freedom of the press is not a special privilege of any class. Rather it is the right of the people and one not lightly to be curtailed.

Conclusion.

The questions presented by the petition for certiorari herein are of such substantial importance as to justify review by this Court.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
As Amicus Curiae,
By ELISHA HANSON, *Counsel for Amicus Curiae.*

April —, 1940.